IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2538 OF 2005

Deepak K.Parekh. ..Petitioner.

V/s.

Vijay F. Behal & Anr. ..Respondents.

Mr.Prakash Naik h/f. Ms.Savita Suryavanshi for petitioner.

Ms.C.Nanavatty i/b Mannadiar & co. for respondent No.1.

Ms.M.H.Mhatre, APP for State.

CORAM: A.M.KHANWILKAR,J

DATE : DECEMBER 1, 2005.

P.C. :

1. Heard counsel for the parties.

2. Rule. Rule made returnable forthwith by consent.

3. Ms.Nanavatty waives notice for respondent NO.1. Ms.Mhatre, APP for respondent No.2. As short question involved, petition is taken up for final hearing forthwith by consent.

4. By this petition, petitioner accused takes exception to the order passed by the trial court

dated 27th September, 2005 whereby the application preferred by the petitioner to summon the Income tax officer of the concerned ward of the Income Tax Department to produce income tax documents, return filed by the complainant for the period of 1999-2000, 2000-2001 as witness in the pending complaint came to be rejected.

5. The reason recorded by the lower court as can be discerned from the impugned order is that witness was already cross-examined and the defence counsel has made such application only because prosecution witness did not produce certain documents called for during the cross-examination of witness. The court then proceeds to observe that Section 254 (2) of Cr.P.C. was unavailable in the fact situation of the present case.

6. Having considered rival submissions, and going through the record, I have no hesitation in allowing this petition. The court below has not clarified as to on what basis it has reached to the conclusion that Section 254(2) of the Cr.P.C. was unavailable to the fact situation of the present case. In my opinion, that provision can be invoked before the Magistrate, if application to be filed by

the prosecution or accused for issuing summons for calling any witness for proving any document or other contentions. Such application can be moved at any stage of trial. There is no restriction imposed in the said provision that such application cannot be filed after the cross examination of particular witness was already over or some other witness was under cross-examination. To that extent the approach of the court below cannot be sustained.

7. The other view taken by the lower court that the witness was under cross-examination and the defence counsel has made an application at such belated stage, merely because the complainant during the cross-examination has not produced certain documents. This opinion merely overlooks the background in which the application was filed by the petitioner accused. It is the petitioner's case that the complainant never extended any loan facility to the petitioner. The respondent complainant without producing its books of accounts wants to substantiate that loan amount was disbursed to the petitioner. To counter that position, it had become necessary for the petitioner-accused so as to discharge the presumption against the petitioner arising under section 138 of the Negotiable Instruments Act to

require production of the Income Tax return of the complainant for relevant years, so as to demonstrate that there was no entry mentioned in the accounts of the complainant that any loan facility was extended to the petitioner. That aspect will be relevant for the trial. Suffice it to observe that production of income tax return was necessary also because during the cross-examination the complainant has accepted the position that unless he goes through the return filed before the Income Tax authorities, he will not be able to give particulars which were sought during the cross-examination. Whilst taking that stand, no attempt was made to produce Income Tax Return by the complainant. Viewed in this perspective, request made on behalf of the petitioner was reasonable and the evidence which was to be produced would be necessary for full, complete and effectual adjudication of proceedings. Accordingly, this petition succeeds.

8. Impugned order dated 27th September, 2005 is set aside and instead application preferred by the petitioner-accused before the trial court is allowed. The trial court may pass appropriate orders as may be advised in the matter.

9. I am informed that after the impugned order was passed, the trial court has closed recording of evidence. If it is so, in view of the order of this court, the trial court may pass necessary order as may be required and warranted in the fact situation of the present case.

10. Ordered accordingly.